United Automobile, Aerospace and Agricultural Implement Workers of America Local No. 2333 (B.F. Goodrich Aerospace Landing Gear Division of the B.F. Goodrich Company)[1] ***and*** **David Smith.** Case 8–CB–9023

May 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On August 28, 2001, Administrative Law Judge Earl E. Shamwell Jr., issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] The General Counsel submits that the name of the Employer is correctly set forth in the pleadings in this case and requests that the case caption be modified accordingly. We grant the General Counsel's request.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's statement that "credibility, in my view, was not of much moment in my assessment of the merits of each party's claim," and that "this case does not rest on credibility." To the contrary, we find that the judge made credibility findings necessary for the resolution of the legal issue of whether the Union violated Sec. 8(b)(1)(A) by refusing to accept and process the Charging Party's grievance. Although the judge stated that "I believe that in the main, each witness testified forthrightly," the judge more specifically found that he "credited the testimony of the Respondent's officials regarding their interpretation of the contracts they negotiated and/or administered, as well as their investigation of Smith's claim." The judge thus found that the Union conditionally accepted and investigated Smith's grievance; and he credited denials by Union Agents Joe Cantale, Ed Gohr, and Gregory Tokar that they made derogatory statements about Smith that indicated that the Union would not investigate or process Smith's grievance. Accordingly, we need not rely on the judge's alternative finding that even if the union agents made derogatory remarks, the remarks did not interfere with the investigation of the grievance.

Chairman Battista notes that the judge said, "I am inclined to credit Cantale's, Gohr's, and Tokar's denials because I believe they each testified credibly, and there is no compelling reason to give [General Counsel witnesses] Williams' and Dawson's accusations greater weight than their denials." However, the judge also said that all witnesses testified "forthrightly." He concluded that the credibility issue was "not of much moment," and the case did not "rest on credibility." In these circumstances, Chairman Battista is unable to say that one set of witnesses preponderates over the other. Thus, the General Counsel has failed in his burden of establishing, by a preponderance of the credible evidence, facts necessary to establish the violation. Chairman Battista does not reach the issue of whether a violation would have been shown if the General Counsel's witnesses had been believed and Respondent's witnesses disbelieved.

We correct the judge's inadvertent erroneous statement that "[Edward] Gohr's agency status was stipulated and agreed to by the Respondent during the hearing." The record reveals that the stipulation was to Gregory Tokar's agency status.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Thomas M. Randazzo, Esq., for the General Counsel.
Bryan O'Connor, Esq. (Joyce Goldstein and Associates), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE FACT

EARL E. SHAMWELL JR., Administrative Law Judge. This matter was heard by me on February 13 and 14, 2001, in Cleveland, Ohio. Based on an unfair labor practice charge filed on November 23, 1999, by David Smith against the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local No. 2333 (the Respondent), the Regional Director for Region 8 of the National Labor Relations Board (the Board) issued a complaint dated August 18, 2000, against the Respondent. The complaint alleges that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by failing and refusing to accept and process a grievance of David Smith because he refrained from engaging in union activities. The Respondent timely filed an answer to the complaint admitting some allegations but essentially denying the commission of any unfair labor practices. The Union also asserted certain affirmative defenses and requested reimbursement for costs and attorneys' fees pursuant to the Equal Access to Justice Act.

On consideration of the entire record, including posthearing briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

B. F. Goodrich Aerospace Landing Gear Division of the B. F. Goodrich Company (the Employer), an Ohio corporation, with an office and place of business in Cleveland, Ohio, is and has been engaged in the manufacture of landing gear parts for the airline industry. The Employer, in conducting its aforesaid business operations, annually purchases and receives at its Cleveland, Ohio facility, goods valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondent admits, and I would find and conclude, that the Employer is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION AND THE APPROPRIATE UNIT

The Respondent admits, and I would find and conclude, that at all material times, it is and has been a labor organization within the meaning of Section 2(5) of the Act. Furthermore, at all material times, by virtue of Section 9(a) of the Act, the Respondent, together with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, has been the exclusive collective-bargaining representative of the following employees (the unit) of the Employer:

> All full-time and regular part-time factory hourly-rated employees employed by the Employer in the Greater Cleveland area, but excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

The Respondent admits, and I would find and conclude, that the unit is an appropriate unit for purposes of collective bargaining.

III. THE UNFAIR LABOR PRACTICES

A. Background Facts[1]

David Smith is currently employed by the Employer, having begun his employment on March 7, 1978. Smith has been a unit employee from the beginning of his employment and has been continuously employed in various departments of the Employer's operations. However, for the period covering October 1979 through 1984, Smith was employed as a maintenance supervisor and was removed from the unit. In 1984, Smith returned to the hourly ranks[2] and received from the Union an adjusted (unit) seniority date of October 11, 1982. Smith's employment with the Employer has been interrupted by two layoffs over the years; for instance, he was laid off on June 7, 1994 (recalled on September 8, 1997), and October 22, 1999 (recalled on about April 24, 2000). It is Smith's October 22, 1999 layoff that forms the basis of the charges he leveled against the Respondent, and the instant litigation. Smith's layoffs were in each case governed by the terms of the collective-bargaining agreements then in force at the respective times.

Unit employees have been represented by certified collective-bargaining representatives since at least 1979, up to the present. During the period covering 1979–1991, unit employees were represented by Aerol Aircraft Employees' Association (AAEA), an independent union; from 1991 to the present, the unit has been represented by the Respondent[3] with which AAEA, by vote of unit members, became affiliated.

Robert (Bob) Williams and Bernard Dawson have been employed by the Employer since November 8, 1965, and November 29, 1966, respectively, and served as officials of AAEA for a number of years. When AAEA affiliated with the Respondent, new union leadership was elected. During the material period—October 22, 1999, through the time of the hearing—admitted agents Joseph (Joe) Cantale, Edward (Ed) Gohr, and Gregory Tokar held the offices of president, chief steward, and committeeman/grievance committee chairman, respectively, and were responsible for administering, policing, and interpreting the applicable collective-bargaining agreements between the Respondent and the Employer, including the provisions thereof dealing, inter alia, with terms and conditions of employment and the grievance and arbitration procedures.[4]

B. The Handling of Smith's Grievances

The General Counsel called three witnesses to establish the charge herein—David Smith, Robert Williams, and Bernard Dawson.

David Smith explained why he believed that, first, he was entitled to have his grievance—his disagreement with the Employer's decision to lay him off on October 22, 1999—processed by the Respondent; and, second, the Respondent, in his view, refused to process his grievance for unlawful reasons.

According to Smith, after his stint in management from October 1979 to 1984, he returned to the unit as an hourly worker and received his adjusted seniority date that, according to his understanding, was to be used for bidding for jobs and bumping of less senior employees, but not for layoff determinations by the Employer. Smith stated that where layoffs were concerned, he was told by Robert Williams of the AAEA that the collective-bargaining agreement in force in 1984 in article IV(c) protected him from the layoffs that were occurring at the time he returned to the unit; further, that his protection from layoff derived from his hire date and not his adjusted seniority date.[5] According to Smith, the AAEA position made sense to him and seemed vindicated by several factors. First, at the time of his return to the unit in 1984, unit employees were being laid off; he was not, although he admits he did not return to his old job but was assigned to another occupation at the Company.

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[1] In this section, I have set out certain matters that factually are not in dispute and/or represent findings on my part based on factual stipulations of the parties and the credible evidence (including the reasonable inferences therefrom) of record. I have specifically credited the findings in this section over any other arguably contrary or inconsistent evidence.

[2] It is not disputed by the parties that by dint of an agreement between the Employer and Smith, at his option or that of the Employer, he was allowed to return to the hourly ranks.

[3] For a time, the Employer was called Cleveland Pneumatic Company and evidently was acquired by or merged with B. F. Goodrich around 1994, and its name was changed to B. F. Goodrich Aerospace Landing Gear Division.

[4] With respect to the agency status of the three individuals, the Respondent admitted in its answer that Cantale and Gohr were agents within the meaning of Sec. 2(13); Gohr's agency status was stipulated and agreed to by the Respondent during the hearing. (Tr. 13–14.)

[5] Art. IV(c) of the collective-bargaining agreement in existence at the time Smith returned to the unit is contained in GC Exh. 2(B). The entire agreement was not offered by the General Counsel. The provision, in pertinent part, provides:

> The Company recognizes that there have been provisions in the collective-bargaining agreements since 1972 protecting those employees in the bargaining unit from layoff. It is the intent and policy of the Company to continue this approach to job security not only through, but beyond the termination date of this agreement. *In this effort, the Company agrees that employees on the active payroll who were members of the Association as of July 1, 1978, shall be protected from layoff for the term of this agreement.* [Emphasis added.]

Second, during another round of layoffs at the Company, about 1991 according to Smith, a number of unit employees who had more seniority than he were laid off.[6] According to Smith, the applicable agreement between the Employer and the AAEA covering this timeframe like the contract in place when he returned to the unit in 1984 provided (in article 4.2(c)) for a July 1, 1978 protection-from-layoff date.[7] Since he was hired on March 7, 1978, he was protected from layoff during the term of the contract.

Third, according to Smith, during the period covering 1991–1994, there were layoffs at the Employer, but he was not laid off but remained in his position in the kellering department. Smith attributed his not being laid off again to the then applicable agreement between the Employer and the AAEA in article 4, section 4.2(c) that contained a layoff protection date of December 12, 1978, which was more favorable to him.[8] Again, according to Smith, he believed there were employees in his department who had more unit seniority vis-a-vis his adjusted seniority date who were laid off; but he was not.

Finally, Smith noted that he was again laid off around May or June 1984. However, he did not disagree with or grieve this determination because the applicable agreement[9] provided for a layoff protection date of March 5, 1978, which date was 2 days prior to his hire date of March 7, 1978.

Turning to the issue at hand, Smith stated that he was recalled from his 1994 layoff on about September 8, 1997, at which time a new collective-bargaining agreement was in place. According to Smith, this contract, as it pertained to employees such as he who were not on the active payroll as of May 19, 1997, provided for a layoff protection date of March 5, 1979.[10] Smith stated that he believed this language protected him because the March 5, 1979 date clearly encompassed his hire date of March 7, 1978.

According to Smith, while he was punching in for his shift on or about October 21, 1999, his supervisor, Doug Hillebrand, advised him that there were going to be some layoffs in the department and that he was going to be laid off. Smith said that he initially contacted his Union Steward Jack (last name unknown), about the proposed layoff but, because he was not available, decided to contact the Respondent's officials, Edward Gohr and Gregory Tokar, that same morning. According to Smith, he conversed with Tokar and Gohr, expressing to them his view that he was protected from layoff. Smith said he was told that the Respondent's president, Cantale, was out of town, but that they would check out his claim. Smith was not sure of the date, but he also stated that he advised Tokar and Gohr that they should speak with Williams who knew that Smith had been protected over the years from layoff based on his hire date irrespective of his adjusted seniority date. However, Gohr and Tokar disagreed with him and insisted that the seniority date would control for purposes of layoff determinations under the existing contract.[11]

According to Smith, Gohr and Tokar advised him that they would have to speak with Mark Hunt, the Employer's human resources manager.

On October 22, Smith said he received official notice of his layoff and again contacted Gohr and Tokar, who once more advised him that his 1982 adjusted seniority date would govern the matter. According to Smith, he advised Gohr that he wanted to file a grievance and Gohr asked him whether he wanted to fill out his own grievance or allow him (Gohr) to prepare one for him. Smith said that he permitted Gohr to prepare the grievance and he would sign it; and he did sign the proposed grievance on October 22, 1999.[12]

According to Smith, his last day at work was October 22, a Friday.[13] However, in early November 1999, Smith stated he called Gohr about the status of his grievance and was told by Gohr that the Respondent was still working on it. Later, on about November 19, Smith stated he spoke to Cantale, president of the Union, who advised him that the Union had determined that Smith's 1982 adjusted seniority date would control for purposes of layoff and that essentially Smith did not have a grievance; rather, he had a complaint. According to Smith, Cantale told him that the former union (AAEA) and the Employer had made a mistake and the Respondent was going to

[6] Smith stated that a unit employee, Myron Dzek, was hired in 1979 and laid off during this period. Smith also believed that unit employees Wilbur Abercombie and John Martin had greater seniority but, nonetheless, were laid off at this time.

[7] See GC Exh. 2(d). Again, this exhibit contains an excerpt from the agreement between the Employer and the AAEA covering the period May 16, 1988–1991. The agreement eliminated the Roman numeral IV and replaced it with the Arabic 4, and the layoff protection clause was renumbered to 4.2(c). The language relied on by Smith was identical to previous contracts.

[8] The 1991–1994 agreement in excerpted form is contained in GC Exh. 2(e).

[9] See GC Exh. 2(f) which contains art. 4, sec. 4.2(c) for the contract covering the period May 16, 1994, through May 15, 1997. It should be noted that the Respondent is now representing the unit at this time.

[10] See GC Exh. 2(g), the excerpted agreement between the Employer and the Respondent for the period of June 6, 1997–May 15, 2000. This exhibit contains art. 4, sec. 4.2(c), which provides in pertinent part:

> The Company recognizes that there have been provisions in the collective-bargaining agreements since 1972 protecting those employees in the bargaining unit from layoff. It is the intent and policy of the Company to continue this approach to job security not only through, but beyond the termination date of this agreement. *In this effort, the Company agrees that employees on the active payroll as of May 19, 1997 and who were members of the Union as of September 3, 1996, shall be protected from layoff for the term of this agreement. Employees not on the active payroll as of May 19, 1997 will have a protection date of March 5, 1979.* [Emphasis added.]

[11] At this juncture, it should be noted that the Employer and the Respondent had entered into a new agreement with an effective date of October 1, 1999, and terminating on May 16, 2003. See GC Exh. 4, the contract in its entirety. Smith's position that he was protected under this contract was based on his aforestated belief that since art. 4., sec. 4.2(c) under the previous contract protected him based on his hire date. According to Smith, art. 4, sec. 4.2(c) of the new contract, being unchanged, gave him similar protection based on his hire date.

[12] See GC Exh. 5, a copy of Smith's grievance dated October 22, 1999, and signed by Smith and Gohr. Smith claims he did not receive a copy of this until sometime in November 1999.

[13] The parties stipulated and agreed, however, that Smith was "laid off to the street" by the Employer on October 25, 1999. (See GC Exh. 3.)

correct the matter. Smith said that he told Cantale he was going to file a charge with the Board.

Later on, about November 22, 1999, Smith said he received a letter from Gohr which advised him that the Respondent, after investigation of his proposed grievance, was not going to file his grievance because, in its view, his layoff was justified by his 1982 adjusted seniority date and, therefore, there was no violation of the collective-bargaining agreement.[14]

Smith noted that during the period he acted as a supervisor, he wrote up various employees for not doing their jobs, which he believed created much animosity against him in the unit. According to Smith, he was called names such as asshole and believes Cantale discriminated against him in the handling of his grievance.[15] However, Smith also believed that Gohr did not pursue his grievance because he was receiving a lot of feedback from the members of the Union who had animosity against him for his conduct while in management.[16]

Smith admitted that the Respondent never expressed any view other than that his adjusted seniority date was going to be used to determine his layoff rights, that the Union was going to go by that date. (Tr. 75.)

Robert Williams identified himself as a current employee of the Employer, having started with the Company on November 8, 1969, and a former official of the independent AAEA.[17] Williams testified that when he served as an official with the AAEA, he was intimately involved in the grievance process and with the administration and interpretation of the various collective-bargaining agreements between the old union and the Company.[18] Williams has known Smith for a number of years, including the time he was a supervisor in the maintenance department and when he returned to the hourly ranks.

According to Williams, Smith was not a particularly good supervisor and did not know how to handle the workers and, consequently, many workers did not like him. Smith, according to Williams, was reputed to be vindictive and earned special enmity among the unit workers when they staged a walkout (wildcat) strike in 1981 and Smith "fingered" many of the strikers for union activity, with the result that a lot of workers were either fired, or suspended for up to 3 months.

Williams stated that Smith returned to the unit in 1984 when he was chief steward and claimed that he was entitled to do so by virtue of a letter from the Employer which stated essentially that Smith could return to hourly ranks at his or the Company's discretion.[19] According to Williams, he was notified by management in 1984 that there was a problem with Smith, mainly that there was an issue as to whether he could be laid off. Williams stated that he met with the then-Employer vice president, the AAEA president, and chairman of the Union's grievance committee and discussed the layoff protection clause in the current contract. Ultimately, the Employer and the AAEA concluded that Smith was protected from layoff under article 4, paragraph 7(c) based on his hire date.[20] Therefore, although there were layoffs occurring in 1984, Smith was determined immune from layoff because he was on the active payroll—by dint of his March 7, 1978 hire date—as of on or before July 1, 1978, consistent with the layoff protection language of article 4, paragraph 7(c) in the 1981–1985 contract.

Williams acknowledged that certain unit employees like Myron Dzek and Wilbur Abercombie, who were hired in 1979 and had more unit seniority than Smith, were laid off during various layoffs during the period covering 1991–1994. Williams stated that these workers protested to him about their being laid off while Smith was not. However, the AAEA advised them that Smith was protected by his hire date and the Association stood by that position; there was nothing they could do.

Williams noted that the AAEA interpretation was applied consistently to Smith and noted that when Smith was laid off in June 1994, it was because the current agreement provided for layoff protection for employees who were actively on the payroll on or before March 5, 1978; and Smith was not protected because his hire date was March 7, 1978.

Turning to Smith's layoff in October 1999, Williams believed that Smith, under article 4.2(c) of the applicable agreement (June 6, 1997–May 15, 2000), was protected from layoff because the agreement provides that employees not on the active payroll as of May 19, 1997—Smith—will have a protected date of March 5, 1979. According to Williams, since Smith's date of hire preceded that date, he should have been protected

[14] See GC Exh. 6, a copy of the November 22, 1999 letter from Gohr to Smith. This letter also indicates that a copy of Smith's unprocessed grievance (GC Exh. 5) was attached.

[15] Smith acceded that he does not believe Cantale personally had anything against him. (Tr. 56.)

[16] Smith related his experience with a unit member named Vaga, who, as late as sometime in 2000, spat at his feet every time he saw Smith. However, Smith reported this behavior to Cantale and Gohr who spoke to Vaga and the spitting ceased as a result. Gohr admitted that the Respondent—Gohr as chief steward in particular—has never refused to give him anything or cooperate with him during the grievance process, and that he and the current union officials never experienced any problems while he was a supervisor.

[17] Williams stated that he served as union steward from 1968–1969 and 1970 to 1972. In 1975, he served as union steward and was elected as a committeeman in 1976. He served as vice president in 1997 and again as steward in 1979, 1980, and 1981. He was elected chief steward in 1982 and served in that capacity until 1985; he also served as chief steward from 1991–1994. Williams ran for president of the Respondent in 1998 but was defeated.

[18] Williams stated that he participated in the negotiation of the contracts between the AAEA and the Employer but had no role with regard to the contracts between the Respondent and the Employer.

[19] Williams stated this letter was unusual and at first he did not believe Smith possessed it. However, Smith did at a later time show it to him. The letter was not produced at the hearing.

[20] Williams elaborated on this point, explaining that the hire date approach to any layoff protection, at least in Smith's case, was connected to the AAEA's interpretation of art. 47(d) of the 1979–1988 agreement (GC Exh. 2(a)). According to Williams, the Company could not subcontract any work if a unit worker was laid off. In such event, the Company would have to return all work from the subcontractors to the Unit. Thus, the AAEA and the Company agreed that any employees employed on or before May 16, 1979, were protected from layoff. When Smith returned to the unit in 1984, AAEA employed similar reasoning to his possible layoff. Since art. 4, in the applicable contract—the 1981–1985 agreement—provided for a July 1, 1978 protection date, and Smith's hire date was March 7, 1978, he was determined protected from layoff at that time.

and he advised Smith of his view. [Note: Williams conceded that the subcontracting-out provision was not at issue at this time.]

Williams stated that Smith asked him to talk to the Respondent's officials, Gohr in particular. Williams said that he told Smith that he would speak with the Respondent only if asked. Later, he was indeed asked by Gohr to come to the Respondent's office and he met with him.[21] According to Williams, he advised Gohr of the history of the AAEA's experience with the protection clause and that Smith was protected by his hire date because, in his view, the Employer could not lay off Smith and continue to subcontract work out of the unit.

According to Williams, Gohr responded by saying that the 1997 agreement was changed to prevent Smith's recall.[22] Also, Gohr did not agree with Smith's hire date's being controlling and, according to Williams, seemingly ignored what he had to say. Williams believed that Gohr's mind was made up and that the meeting was a mere formality.

Williams also attested to several conversations he had with the Respondent's officials after Smith was laid off. Williams stated that on one occasion, simply out of curiosity, he asked Cantale, who was visiting the facility, about Smith's grievance which he understood had been submitted to the Respondent. According to Williams, Cantale merely said, "Screw Dave Smith."[23] On another occasion, Williams stated that he, Bernard Dawson, Tokar, and a union committeeman initially were discussing Dawson's pending grievance and the conversation turned to Smith, whereupon Tokar said that "[Smith] ain't nothing but a f—g asshole anyway." Williams stated that he told Tokar to be careful about what you say to people, telling him that someone is going to take that the wrong way. Tokar merely said, "I hear ya." Then, sometime in November, Williams said he spoke to Smith who advised that Gohr had told him that the grievance would not be processed. According to Williams, the next day, he spoke to Gohr about Smith's grievance and Gohr told him that Smith had a complaint, not a grievance.[24] Gohr said nothing more about the matter. Williams conceded that Gohr's calling him down to the Respondent's office was part of the Union's investigation of Smith's complaint and that the Respondent's view that article 4, section(c)'s protections applied to seniority dates was maintained consistently throughout the investigation. Nonetheless, Williams stated that he told Tokar around October or November 1999 that he thought the Respondent discriminated against Smith and, because he felt that the seniority approach was unfair to Smith, he had advised Smith to file an unfair labor practice charge.

Bernard Dawson[25] testified about his views on the layoff and seniority provisions of the Respondent's contract with the Employer and the Union's handling of Smith's grievance.

Dawson testified that he knows Smith and his history with the Employer, including his hire date of March 7, 1978, his temporary assignment to management, and his return to the hourly ranks in 1984. According to Dawson, Smith's return to the unit was controversial and resulted in the filing of grievances and charges with the Board, as some unit members viewed his return as illegal. However, the matter was resolved based on Smith's agreement with the Employer allowing him to return to hourly and a decision by the AAEA that his hire date protected him.[26]

Dawson stated that Smith's adjusted seniority date in 1984 did not confer sufficient seniority to return him to the occupation he held prior to working as a supervisor. However, because of the agreement with the Employer and Smith's hire date, he was returned to the unit in another occupation, while other workers with more unit seniority were laid off. According to Dawson, historically, Smith's layoff protection date has been his hire date and seniority was never utilized as a determinative factor by the AAEA during his (Dawson's) tenure.

Turning to Smith's layoff in October 1999, Dawson recalled other unit workers questioning its legitimacy. Dawson said he, too, shared his view to the workers that Smith had a legitimate grievance. Dawson stated that he, Williams, Gohr, and Tokar were meeting in the union office after the layoff in October 1999 and the conversation turned to Smith, with he and Williams arguing for Smith's protection from layoff under the contract and Gohr and Tokar arguing against. According to Dawson, Tokar, after a while, simply said that he really did not care about the "f—g asshole."[27] Dawson stated that he warned Tokar to be careful about his attitude because it could get everyone in trouble. Dawson also related another conversation about Smith's layoff in October 1999 with Gohr and Cantale who made some sort of derogatory remark (which he could not remember) about Smith.[28]

[21] Williams did provide a precise date but reckoned that the call from and meeting with Gohr took place within the 3-day notice period governing layoffs under the contract.

[22] Williams stated that he admonished Gohr to be careful about comments such as this.

[23] Williams, when cross-examined about his averments in an affidavit he submitted to the Board agent, said that actually Cantale said, "F—k Dave Smith." He explained he did not want to use that language in the affidavit.

[24] Williams stated that Smith told him that Gohr was going to reject the grievance and had said that Smith did not have a grievance, he had a complaint. Smith, it should be noted, testified that Cantale told him that he did not have a grievance, rather a complaint. (Tr. 48.)

[25] Dawson stated that he held several positions with the AAEA (but none with the Respondent), including steward from 1967–1969, rules committeeman and membership committee from 1973–1978 and 1981–1983, respectively; he served as chief steward from 1985–1987. Dawson also served as interim president and president of the AAEA from around October 1988–1992. Dawson's duties in these various offices included day-to-day administration of the Union's negotiation, and interpretation of collective-bargaining agreements. Dawson also acknowledged having unsuccessfully run for the office of chief steward against Gohr in 1998. Dawson also stated that he had unsuccessfully run for grievance committee chairman in March 2000 against Tokar.

[26] According to Dawson, Williams told him that Smith was returned to hourly because of his date of hire and the position was verified by the Employer's department of human resources.

[27] Dawson, for his part, allowed that he viewed Smith as a "flaming asshole" (as opposed to a "f—g" one), and that is how Smith generally is regarded around the plant because of Smith's role in the 1981 strike.

[28] Dawson stated that Gohr and Cantale were visiting with him regarding a grievance he had filed over a denial of payment of sick benefits by the Employer at the time; and Williams happened to be at his

The Respondent called several witnesses to meet the complaint allegations—Bill Minor, John Cantale, Edward Gohr, and Greg Tokar.

Bill Minor identified himself as the International representative for the United Auto Workers (Region 2) since 1993; his duties generally include assisting local unions in contract negotiations and handling grievance procedures pertinent to various collective-bargaining agreement.

Minor stated that he has been directly involved in contract negotiations with the Employer since 1994 and particular was a signatory to the first contract between it and the Respondent—the 1994–1997—agreement. According to Minor, the date referred to in article 4.2(c)—March 5, 1978—was meant to protect employees from layoff based on their (unit) seniority. Minor explained that during the 1994 contract negotiations the Employer's business was suffering a downturn and the Employer proposed to reduce the number of protected employees. After bargaining back and forth over the number of employees to be laid off, the Employer supplied the bargaining committee with an employee seniority list which was used to arrive at a cutoff date to reach the desired number for layoff; March 5, 1978, was the agreed on cutoff date. According to Minor, March 5, 1978, corresponds to the employees' (unit) seniority date and not their hire dates. Moreover, in these negotiations concerning section 4.2(c), the hire date was never discussed as a criterion for purposes of layoff determination.[29] Minor stated that under the 1994–1997 contract an employee with a hire date prior to March 5, 1978, but with an adjusted seniority date after March 5, 1978, would not have been protected from layoff during the term of that contract.

Turning to the agreement between the Employer and the Respondent for the period covering June 6, 1997–May 15, 2000, Minor testified that he was also involved in the negotiations and in fact was the chief spokesman for and a signatory on behalf of the Respondent. According to Minor, the Respondent sought to protect basically all unit workers employed at that time and therefore section(c) was designed to protect all employees on the payroll as of May 19, 1997, and who were members of the Respondent as of September 3, 1996; the September 3 date corresponded to the least senior unit employee in the plant at the time. As to employees not then on the active payroll as of May 19, 1997 (like Smith), a protection date of March 5, 1979, was agreed on for purposes of recall to work. According to Minor, March 5, 1979, is based on the employee's seniority date—not his hire date; and again in point of fact, there was no discussion about the dates in section(c) referring to hire dates. Accordingly, for the life of this contract, according to Minor, any employee recalled would have a protection date based on his unit seniority and, to be protected from future layoffs, that seniority date would have to be on or before March 5, 1979.

Minor stated that he also was the chief spokesman for the current agreement[30] between the Employer and the Respondent. Minor noted that while the language of section(c) was unchanged in the current contract, the Employer proposed in negotiations to delete it entirely. However, more to the point, according to Minor, there was again no discussion about March 5, 1979, as a hire date. According to Minor, as such, section(c), to the extent it protects employees from layoff, it does so on the basis of unit seniority. Similarly, March 5, 1979, establishes a seniority date basis for employees not on the active payroll as of May 19, 1997.

Minor stated that in his view, in spite of prior interpretations that may have been given to section(c) at different times while another union was presenting the unit, and pursuant to different contracts,[31] that any employee who works in management loses seniority for that time, and that such an employee under the contract cannot gain an advantage over hourly workers in the unit. According to Minor, section(c) must be considered with the seniority provisions of the contract[32] and is not in itself controlling on the issue of layoff (and recall) determinations. Minor stated that section (c), in his view, does not lend itself to different interpretations—unit seniority controls—and resort to an arbitration would not be necessary.

Minor noted that he did not know Smith personally and only about his complaint in the context of the instant litigation. However, in his view, the contracts between the Employer and the Respondent would not allow Smith to use his hire date as a protection date, because to do so would give him an unfair advantage over unit employees for time he spent in management. This would, in Minor's view, render the seniority provisions meaningless. Minor volunteered that if Smith was protected in the past from layoff based on his hire date, this was a mistake. However, as far as he was concerned, the Respondent was not attempting to rectify any mistakes but merely following the contract language.

Edward Gohr[33] testified about the handling of Smith's grievance by the Respondent. Gohr stated that as chief steward

workstation. Dawson did not report this remark (nor Tokar's) to the Employer or the Respondent.

[29] Minor stated he had no knowledge or understanding that hire dates were ever used in the agreements prior to 1994.

[30] The current agreement is contained in GC Exh. 4 and covers the period October 1, 1999, through May 16, 2003. Minor explained that the agreement was negotiated about 9 months earlier to take advantage of certain operating changes proposed by the Employer that would allow the Cleveland plant to remain open. As noted, Smith was recalled pursuant to this agreement in April 2000.

[31] Minor stated, based on pertinent questions posed by the General Counsel regarding sec. 4.2(c), that if at any time unit employees with greater seniority than Smith were laid off, this was violative of the contract. Furthermore, in his view, if this occurred by mistake, it does not change the language of the contract, and that no union official or company representative can make an agreement in conflict with contract that has been accepted and ratified by the membership. In short, according to Minor, a violation of the agreement, whether by mistake or negotiation, cannot be controlling or binding in the future.

[32] While the only complete contract in evidence is the current one, I note that sec. 10 deals with the seniority. Sec. 10.19 specifically deals with transfers from hourly to salary and retransfer to hourly rates and, in sec. 10.196, there is a provision for determining an adjusted seniority date for workers like Smith.

[33] Gohr began his employment with the Respondent in April 1989 when it was known as Cleveland Pneumatic. However, Gohr was laid

(since 1998), he is responsible for the initial steps of the contract grievance process which includes verbal discussion between the employees, the regular steward, and the immediate Employer supervisor; a formal first step which entails a write-up of the grievance; and then on to the second step if there is no resolution.[34]

Gohr stated that he participated in the negotiations leading to the 1999–2003 contact and that the section(c) dates, which remained unchanged from the previous agreement, were not discussed in terms of hire dates; it was his understanding that section(c) pertained to an employee's (unit) seniority.

Explaining how the language of section(c) of the 1999–2003 agreement worked, Gohr stated that if an employee were hired prior to or on March 5, 1979, and he was on layoff (hence, not on the active payroll) but was recalled during the life of the agreement, then the employee is protected by that worker's seniority date; however, if the employee's seniority date was after March 5, 1978, the employee would not be protected. According to Gohr, both the Respondent and the Employer interpreted the clause in this fashion.[35]

Turning to Smith's layoff, Gohr stated that on October 21, 1999, the Employer posted a layoff notice that included Smith. However, prior to the posting, Smith had come to the union office claiming that he heard a rumor that he was going to be laid off, but that he thought this would be improper because his hire date protected him. Smith also claimed he had some documentation that supported his position.[36]

According to Gohr, prior to Smith's so informing him in this meeting, he was unaware that Smith's hiring and seniority date were different. At any rate, Cantale, Smith, and he discussed section(c) with Smith claiming that his hire date protected him based on some documentation he possessed.

Gohr stated that on that day, he conducted an investigation of Smith's claim, first by contacting Hunt in human resources. Hunt provided certain information to him by telephone which he recorded that included Smith's initial date of employment, his time in management, his return to hourly ranks, his 1994 layoff, and his 1997 recall.[37]

Gohr stated that on October 22, 1999, Smith came to the union office and he (Gohr) informed Smith that based on the information received from the Employer, he felt the layoff was proper based on Smith's adjusted seniority date of October 11, 1982. According to Gohr, Smith said he had a document in his personnel file that would show he was protected. According to Gohr, Smith and he again discussed section(c), and Gohr said he again advised Smith that he did not agree with Smith's interpretation that the provision protected him.

However, in spite of his disagreement with Smith, Gohr said that, nonetheless, he wrote up a proposed grievance protesting Smith's layoff,[38] demanding his recall, and that the Employer make March 7, 1978, his protected date for the life of the contract and all future contracts. According to Gohr, he wrote the grievance first in anticipation of receiving the information Smith claimed he had or otherwise existed in his personnel records; and, second, he wanted to write it on October 22, because if Smith was to be laid off that day, he wanted to save him a trip back to the plant the next week to sign the grievance. Gohr stated that irrespective of their discussion about section 4.2(c), he did not cite that provision of the agreement in the grievance because he felt that Smith's seniority rights under article 10 of the agreement were implicated by the proposed layoff;[39] in fact, Gohr said that he did not think there was a violation of section 4.2(c).

According to Gohr, he told Smith that if the information he claimed actually existed in his personnel file with the Employer, he would file the grievance. If the proof were not there, then he would not file because the grievance had no merit. According to Gohr, Smith assured him that the documentation indeed existed.

Gohr said after this meeting, he called Cantale, who was out of town, to apprise him of Smith's matter and that he had written the provisional grievance. Cantale promised to look into the matter on the following Monday (October 25). Gohr also stated that he mailed Smith copies of the previous contracts he had requested on October 22.[40]

On Monday, October 25, Gohr was in the union office with Cantale who spoke to Smith by telephone. Gohr overheard Cantale talking to Smith about the hire date versus seniority date issue and seeking Smith's permission to examine his personnel file. Cantale was given permission and, on that day, he and Cantale went to see Hunt,[41] the Employer's human resources manager, and reviewed, in Hunt's presence, Smith's personnel file. After a 30–35 minute examination of every document, Gohr said that they found no proof that Smith was permitted to have his hire date as a protective date. After the review, Gohr stated that Cantale contacted Smith and advised him of the results of the examination. Cantale asked Smith to produce any proof he may have to substantiate his claim. Gohr stated that he also reviewed the Respondent's files looking for

off in about 1990, was recalled in December 1991; laid off again in November 1992, and was recalled on September 3, 1996. Gohr stated that he lost his recall (and seniority) rights in the last layoff and, therefore, his unit seniority date is September 3, 1996. He is the least senior member of the unit.

[34] Gohr stated that he has handled 200 or more grievances, most of which are verbal.

[35] The Respondent called Gerald DeFalco, the Employer's vice-president for human resources, its chief spokesman during negotiations and a signatory to the 1999–2003 agreement, who essentially corroborated Gohr on this point. He also stated there was no documentation of any agreement between the Company and Smith allowing him to use his hire date as a protection date.

[36] Gohr noted that Cantale was present at this meeting.

[37] See R. Exh. 5, Gohr's handwritten notes of the information he says Hunt provided him.

[38] Gohr identified GC Exh. 5 as the grievance he prepared for Smith on October 22, 1999.

[39] Gohr also felt that art. 18 dealing with rates of pay was implicated as well as art. 11 dealing with hours of work because while on layoff, he would not receive his rate of pay and would have no hours of work and, therefore, in order to effectuate his demand under the seniority provisions, he needed to cite these provisions to receive a meaningful remedy for Smith.

[40] Gohr identified R. Exh. 6, a cover letter from himself to Smith which indicates he was sending the information he had promised.

[41] Hunt is no longer with the Employer and he did not testify at the hearing.

proof to support Smith's position, but could find none. About 2 weeks after the layoff, Gohr said he called Smith and asked if he had found the documentation. Smith said he had not but Smith continued to maintain that the information was in his personnel file. Gohr advised Smith that he and Cantale had reviewed his file and there was no support for his position. Consequently, Gohr mailed a letter[42] to Smith advising him that the grievance would not be pursued because the Respondent had determined that there was no violation of the contract and included a copy of his grievance.

Regarding his dealings with Williams, Gohr said he once did discuss amicably Smith's layoff with Williams,[43] who thought Smith was protected by his hire date. Gohr denied ever telling Williams that Smith did not have a grievance, just a complaint. He also denied harboring any animus against Smith and has never called Smith names such as "asshole," and has not heard any union officials speak profanely or otherwise disparagingly about Smith. According to Gohr, he never consulted with Dawson about the matter.

Joe Cantale testified that he was the current president of the Respondent, having assumed office in 1998;[44] his duties include oversight of the collective-bargaining agreement as well as the day-to-day operations of the Respondent. As president, Cantale stated that he has a role in the grievance-arbitration process covered by the agreements between the Employer and the Respondent.

Cantale, who has known Smith for some time, having worked with him since the 1970s, said that in October 1999, Smith approached him concerning his possibly being laid off because there were rumors that there was a lack of work in Smith's department. According to Cantale, Smith raised the issue of protection dates and said that he did not want this to be problematic. Cantale said he told Smith that he imagined that if he were protected from layoff the last time, he would also be protected this time. Cantale said that when he made this statement to Smith, he had not investigated the matter and was not aware that there was a question about Smith's seniority date.

Turning to October 22, 1999, Cantale said that he was out of town but received a call from his chief steward, Gohr. Gohr advised him that Smith had come to the union office and said that he was being laid off and there was a question about his protection date.

According to Cantale, he told Gohr that all the Respondent could go by was the company records and directed him to contact Mark Hunt of the Company's human resources department and determine Smith's seniority date. Cantale stated that upon his return to the office on October 25, he consulted the Respondent's seniority list to see where Smith fell in seniority. He also on this date called Smith, seeking his permission to examine his personnel file in the Employer's possession because Smith had told him that he had or there was some documentation that would protect him based on his hire date. Having obtained Smith's permission that day, Cantale stated that he and Gohr examined Smith's personnel records in Mark Hunt's office in Hunt's presence.

According to Cantale, he and Gohr spent about 35–45 minutes examining Smith's files which disclosed no agreement (or letter) between Smith and the Company concerning the use of his hire date for layoff protection.[45] Cantale said that he also asked Hunt about any additional documentation and was told that Smith's file was all there was. Cantale said that he and Gohr then returned to the union office, called Smith, and advised him of their lack of success in finding any documentation to support his claim. According to Cantale, Smith said he may have the document in his possession. Cantale said he asked Smith to contact him if he found anything to support his position. According to Cantale, he waited a day or two for Smith to call him and, receiving no call, recalled Smith. Cantale said that Smith advised that he could not find the document but was sure the document existed. However, Smith never provided any documents that would demonstrate he was protected by virtue of his hire date.

Cantale stated he was part of the bargaining team that negotiated the agreement in effect when Smith was laid off and was in fact a signatory. Turning to section(c) of this agreement, Cantale stated that Smith was not on the active payroll on May 19, 1997 (he was on layoff); therefore, the protection date applicable to him and others like him was March 5, 1979, which the Respondent viewed as a seniority date, not a hire date. According to Cantale, the Respondent's position was that Smith was not protected by section(c) of the agreement, and after discussing the matter with Gohr and investigating the matter, the determination was made by him and Gohr that his grievance was unmeritorious.[46]

Cantale acknowledged that Smith's grievance was written up by Gohr, before Smith was actually laid off, but that Smith was told that the Respondent would have to investigate the matter before it would be submitted to the Employer through the grievance machinery.[47] Cantale stated that he read Smith's proposed grievance over carefully and acknowledged while it had no reference to section(c) of the agreement, this section

[42] See GC Exh. 6.

[43] Gohr claimed he did not know Williams was a former union official in 1984 when the protected date issue evidently arose; he later found out about Williams' role with the Union. However, Gohr denied ever summoning Williams to talk about the issue of Smith's grievance and never really sought his opinion on the hire date seniority date controversy. However, he could not be sure whether Smith had asked him to speak with Williams about the coverage of sec. 4.2(c).

[44] Cantale is employed by the Employer and before that its predecessor, Cleveland Pneumatic Company; he has been employed since August 28, 1967. Cantale has held other official positions with the Respondent, including chief steward (1995–1998) and grievance committeeman (1994–1997). Cantale also served as a steward with the AAEA.

[45] Cantale stated he did find documentation regarding Smith's seniority date.

[46] Cantale submitted that he was aware of the Union's legal duty to fairly represent the membership, including the processing of grievances; also, the Respondent's constitution and bylaws incorporate this principle.

[47] According to Cantale, the Respondent has on other occasions handled potential grievances in this fashion; that is, many grievances are written up by the stewards, some by the grievants themselves, but later after investigation by either the steward or grievant, a determination is made that the grievance is not viable. The handling of Smith's complaint was therefore not usual.

was considered along with the seniority provisions as part of the Respondent's investigation. Cantale also acknowledged that the letter sent to Smith denying his grievance was drafted by Gohr on his instruction after both men had considered the matter.

Regarding his contacts with Williams in the Smith matter, Cantale said that he discussed the application of section(c) with Williams but did not summon him to his office for that purpose, and he advised Williams at some point that Smith's seniority date did not protect him from layoff.[48] Cantale acknowledged that he and Williams discussed Smith's proof of his hire date protection but, according to Cantale, he advised Williams that Smith had not provided any documentation to establish that he was protected from layoff.

Cantale testified he harbored no hatred of Smith then or now and denied ever saying "screw" or "f—k Smith" to Dawson or anyone and has never called Smith an "asshole."[49]

Gregory Tokar testified that he is currently employed by the Employer and holds the position of chairman of the grievance committee with the Respondent, a post he has held a little over a year. According to Tokar, he had no involvement in the investigation of Smith's grievance and was not consulted by Cantale or Gohr about the matter.

Tokar stated that he once handled a grievance for Dawson concerning a suspension issue and later a workmen's compensation matter which Dawson had grieved. On one occasion, Tokar admitted speaking with Dawson by his desk about the workmen's compensation matter, but Gohr was not with him. Gohr denied referring to Smith on this occasion as a "f—g asshole" or being admonished by Dawson about his language. Tokar said he has never heard Cantale or Gohr express or demonstrate any ill will or animus to Smith, nor has he heard them make derogatory remarks about him.

C. The Charges as Set Forth in the Complaint

The complaint alleges, in essence, that the Respondent, since November 19, 1999, failed and refused to accept and process Smith's grievance (submitted pursuant to the current collective-bargaining agreement) in which he protested his layoff by the Employer on October 22, 1999, because Smith refrained from engaging in *union* activities.

The complaint essentially further alleges that the Respondent's failure and refusal to accept and process Smith's grievance was based on reasons that were unfair, arbitrary invidious, and, therefore, the Respondent breached its fiduciary duty to Smith (and the unit employees); all in violation of Section 8(b)(1)(A) of the Act.

[48] Cantale denied that Williams ever said to him that Smith was protected by sec. 4.2(c) of the agreement although they discussed the application of the section to Smith after his layoff. According to Cantale, Williams merely said that Smith had been protected from layoff in 1984. Cantale said he questioned Williams' interpretation of the contract of that time and concluded that the 1984 contract language was different and, therefore, not applicable to the contract then in force. Cantale also denied that Smith ever asked him to talk to Williams.

[49] Cantale denied reaching out to Dawson for his opinion on Smith's layoff protection.

D. Applicable Legal Principles

Section 8(b)(1)(A) of the Act provides, in pertinent part, that:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules unless with respect to the acquisition or retention of membership therein.

As a general proposition, violations of Section 8(b)(1)(A) essentially involve unlawful union conduct including economic threats, coercion, or reprisal against unit employees or breach of the union's duty of fair representation.

In cases where the union has been charged with failing to honor or uphold its duty of fair representation in violation of Section 8(b)(1)(A), the Board has established fundamental general principles governing these cases. In *Letter Carriers Branch 6070, (Postal Service)*,[50] the Board proclaimed:

> A union owes all unit employees the duty of fair representation, which extends to all functions of the bargaining representation. When a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith, it breaches its duty of fair representation. But a union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be "highly deferential." Mere negligence does not constitute a breach of the duty of fair representation. And a union's conduct is arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.

The duty of fair representation has been likened to the duty owed by other fiduciaries, e.g., trustee/trust beneficiaries; attorney/client, corporate officers and directors/shareholders; a union officer thus owes employees a duty to represent them adequately as well as honestly and in good faith. *Airline Pilots Assn. International v. O'Neill*, 500 U.S. 913 (1991).

Consequently, the union must show a legitimate union interest with regard to its policies, bans actions, or failures to act as these relate to rules governing its internal procedures. *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18 (1995).

In *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479 (2000), the Board noted that with regard to the interpretation of collective-bargaining agreements, the Respondent must exercise its discretion in good faith, with honesty of purpose and free from reliance on impermissible considerations, citing *PPG Industries*, 229 NLRB 713 (1977), enf. denied 579 F.2d 1057 (7th Cir. 1978).

However, the Board has noted that it is well settled that a union's refusal to process a grievance does not violate the duty of fair representation where the union acted pursuant to a reasonable interpretation of the collective-bargaining agreement and/or a good-faith evaluation regarding the merits of the com-

[50] 316 NLRB 235, 236 (1995).

plaint. *Teamsters Local 815 (Beth Israel Medical)*, 281 NLRB 1130, 1146 (1986) (citing cases). In evaluating whether the union's conduct in such cases breached the duty of fair representation, the Board's responsibility "is not to interpret the pertinent contract provisions and determine whether the Respondent's interpretation [of the contract] was correct. Rather, our responsibility is to determine whether the Respondent made a reasonable interpretation . . . or whether it acted in an arbitrary manner." *General Motors Corp.*, 297 NLRB 31 (1989).

E. Discussion and Conclusions

As noted, the complaint alleges that the Respondent breached its duty of fair representation to Smith in refusing to accept and process his grievance protesting his layoff because he refrained from engaging in union activities.

The Respondent submits that the General Counsel provided no evidence in support of this charge and renewed its original motion made at the end of the General Counsel's case-in-chief to dismiss.[51] The record will reflect that I was indeed of a mind to grant the Respondent's motion at the hearing but reserved a ruling pending the completion of the case, that is, the closing of the record, and a thorough examination and consideration of that record, and the arguments of the parties. I have considered the total record carefully and considerately, and I would find and conclude that the General Counsel has not proven the complaint allegation that the Respondent's failure to accept and process Smith's grievance was predicated on or connected to his refraining from union activities. The General Counsel argues (weakly) that a finding that the Respondent actually discriminates against its members for engaging intraunion activities or for refraining from such union activities is not required to find a violation of Section 8(b)(1)(A). Rather, he contends that it is enough for a union to act arbitrarily, invidiously, or in bad faith. In my view, the General Counsel's argument misses the point. The Respondent, on fundamental due process grounds, rightly contends that it is entitled to know the charges against it and, therefore be able to mount a defense to meet those charges if it chooses. The choice of theory and language giving vent to the complaint allegations are solely within the prerogative of the General Counsel and presumably there should be factual support to these allegations. If the evidence does not support the charge and, as here, the General Counsel does not avail itself of the opportunity to amend the complaint to conform to the proof, then he proceeds at his peril.

On the record, giving the phrase "refraining from union activities" a commonsense, nontortured, or convoluted meaning, I cannot discern what union activities Smith may have not engaged in that may have prompted the Respondent to deal with his grievance request as it did. The General Counsel submits, and it seems undisputed, that Smith's stint as manager in the 1980s may have left some residual bad feelings toward him among unit members. But that was nearly 20 years ago, and the question goes abegging as to what connection his management activities had or may have had to his union activities. Also, it is not altogether clear whether Smith's supervisory behavior was the sole cause of any antipathy towards him, since even those who spoke up for him at the hearing did not think of him in endearing terms. So it may be that Smith's personality traits were at work in producing whatever hard feelings there were against him in the unit. In any event, the record is simply devoid of any meaningful evidence of Smith's having refrained from engaging in union activities which could, in any reasonable way, be connected to the Respondent's decision not to process his grievance. Therefore, I would recommend dismissal of this aspect of the complaint.

I would also recommend dismissal of the complaint to the extent it charges the Respondent with refusing to *accept* Smith's grievance. Clearly, even looking at the evidence in its most favorable light to the General Counsel and the Charging Party, it cannot be gainsaid that the Respondent did not accept Smith's grievance. Certainly, it was accepted by the Respondent, but just as certainly it was done so provisionally. Nonetheless, in no way was it simply refused out of hand by the Respondent and, therefore, I would also recommend dismissal of this aspect of the complaint.

While I have recommended dismissal of certain aspects of the complaint, the issue, in my view, remains whether the Respondent refused to process Smith's grievance for unlawful reasons. The General Counsel submits that Smith's grievance was not frivolous, that he had been protected from layoff under the collective-bargaining agreement in the past by the Respondent's officials, and that his hire date, as opposed to his seniority date, controlled. The General Counsel contends that the Respondent's refusal to process Smith's grievance was arbitrary, invidious and in bad faith as evidenced by the profane and hostile statements allegedly made by the Respondent's deciding officials who, he claims, conducted virtually no investigation of the grievance, including ignoring how past officials of the Respondent interpreted Smith's layoff protection. In short, the General Counsel argues that the Respondent's officials did not like Smith and arbitrarily made no effort to protect him under the collective-bargaining agreement pertinent to his October 1999 layoff.

I will attempt to be brief in my resolution of the remaining issue. As is obvious, I have examined and set out the positions of the Charging Party and the various witnesses in some detail. I believe that in the main, each witness testified forthrightly and basically honestly and sincerely. Credibility, in my view, was not of much moment in my assessment of the merits of each party's claim. On this score, for instance, I have not considered as particularly weighty the fact that Williams and Dawson were former officials of the AAEA and losers in subsequent elections

[51] The Respondent primarily bases its claim for attorney's fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. Sec. 504, and NLRB Rules and Regulations, Series 8, §102.143, et. seq., because of the General Counsel's failure to produce competent evidence to support the allegation as well as the Regional Director for Region 8's alleged refusal to meet with the Respondent's representatives prior to and after the issuance of the complaint. Under EAJA, only prevailing parties may be compensated for fees and costs and other expenses incurred in connection with the proceeding when the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. However, the prevailing party may apply only after entry of the Board's final Order in the applicable proceeding. See Sec. 102.48 of the Board's Rules and Regulations.

for positions in the UAW and, therefore, could be motivated to be less than truthful regarding the handling of Smith's grievance on their watch or in their dealings and relationship with the current union leadership. In likewise, I have credited the testimony of the Respondent's officials regarding their interpretation of the contracts they negotiated and/or administered, as well as their investigation of Smith's claim.

I also believe Smith testified sincerely about his belief that he should have been protected from layoff in October 1999 although his position is primarily based on what appears to be uncorroborated and undocumented evidence.

Thus, in my view, this case does not rest on credibility or even the popularity (or lack thereof) of the witnesses. Rather, applying the legal principles as enunciated by the Board, the question is whether the Respondent's action in deciding not to process Smith's grievance was free of arbitrariness and rational, was done in good faith and not invidiously discriminatory.

On balance, I would find and conclude that the General Counsel has not proven a violation of the Act by the Respondent. My reasons include the following.

First, it is clear that the Respondent is not the same union as the one that earlier represented Smith and which determined he was protected from layoff based on his hire date. Williams quite adequately explained the reasoning of the AAEA in reaching its determination that Smith's hire date controlled and the Employer agreed. However, with the advent of the Respondent, another view of layoff protection emerged, one dictating that unit seniority would control in the determination of layoff protection. The record does not support a finding that this approach was undertaken because of Smith.

Rather, the Respondent's view is eminently rational, for, as the Respondent's primary negotiator of the relevant contract stated, in essence, that unit seniority (as opposed to hire date) was the guiding criterion because employees who happened to have served in salaried management positions were not to be given an advantage over the hourly unit employees. Other nuances and interpretations (probable and possible) of the contract aside, the Respondent's approach and its application to Smith, in my view, is rational and not arbitrary. Thus, in spite of the past practice which afforded Smith protection under prior collective-bargaining agreements negotiated and administered by another union, the new union, the Respondent and its officials, took a different but altogether reasonable and rational approach that would benefit the members of the unit.

Regarding the Respondent's handling of Smith's grievance, I should note that contrary to the General Counsel, the Respondent, in my view, did undertake an adequate investigation of his claim. Notably, it is clear that the Respondent's stance on seniority never changed. However, because Smith claimed to have proof—a letter or other documents—of his hire date protection, the Respondent took steps to verify his claim. Accordingly, the Respondent accepted Smith's grievance but clearly with the understanding that Smith's proof would be forthcoming from some source, presumably the Employer or Smith himself. When the proof did not materialize, the Respondent, consistent with its position, did not process his grievance. Smith was timely informed of this decision.

The General Counsel criticizes the Respondent's investigatory efforts on several grounds, mainly in not consulting with the prior officials and seemingly having made up its mind about the lack of merit in Smith's grievance. However, the Board has (rightly) not set any standards for a union's investigation of a grievance claim and only demands that it be consistent with the union's fiduciary responsibilities, at least, as I read the Board authorities. I would conclude that the efforts by Cantale and Gohr were adequate and gave Smith fair consideration of his claim.

Finally, although I have found that the Respondent's reason(s) for not processing Smith's grievance were rational and nonarbitrary and that its investigation of the matter was adequate. There remains the question of whether personal hostility toward Smith may have impermissibly tainted the decision of the Respondent's officials, that is whether there was bad faith in the decisionmaking process.

We start with an on-point and practical observation by the Sixth Circuit:[52]

> Not all members of the same union are necessarily personal friends. They may even be personal rivals—bearing ordinary human jealousies and conflicting goals. Such personal differences may be evidence that a union officer was hostile to a particular member. . . . Personal hostility is not enough, however, to establish a prima facie case of unfair representation in a union member's discharge if the union's representation during the disciplinary steps is adequate and there is no evidence that the personal hostility tainted the arbitrator's decision.

Furthermore, the Board has recently ruled that a union official's use of profane and derogatory language to describe a unit member claiming that the union breached its duty of fair representation by implied threat not to represent him in a grievance was not violative of the Act, and that such language was mere name-calling.[53] Thus, it is instructive to place negative and derogatory statements by union officials in a certain perspective where such statements are, as here, claimed to reflect hostility sufficient to breach the Respondent's fiduciary duties to the member and the membership.

The General Counsel contends that the Respondent's officials, namely, Cantale, Gohr, and Tokar, made derogatory statements about Smith which clearly indicate that the Respondent would make no effort to protect him through the grievance machinery. Of course, the Respondent's officials denied making the remarks attributed to them. As to whether the remarks were indeed made, I am inclined to credit Cantale's, Gohr's, and Tokar's denials because I believe they each testified credibly, and there is no compelling reason to give Williams' and Dawson's accusations greater weight than their denials. Also, in point of fact, as noted, the Respondent's officials' investigatory actions belie the General Counsel's claimed lack of effort to act on Smith's grievance. Thus, even if the officials had made the remarks, this clearly did not interfere with their investigation of Smith's claim that his hire date protected him. Accordingly, I would find and conclude that the General Counsel

[52] *Van Der Veer v. UPS, Inc.*, 25 F.3d 403, 405 (6th Cir. 1994).
[53] *Letter Carriers Local 3825*, 333 NLRB 343 (2001).

has not established that the Respondent's officials were so personally hostile to Smith that their decision not to process his grievance was tainted as a consequence.[54]

In summary, for the reasons stated above, I find and conclude that the Respondent did not unlawfully refuse to accept and file and process Smith's grievance over his being laid off by the Employer on or about October 25, 1999.

CONCLUSIONS OF LAW

1. B. F. Goodrich Aerospace Landing Gear Division of the B. F. Goodrich Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2333, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent labor organization did not violate Section 8(b)(1)(A) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

The complaint is dismissed in its entirety.

[54] I note in passing that the Respondent's officials, according to Smith, took action against a fellow worker who contemptuously spit at him wherever Smith came near. Here, again, it seems that if the Respondent's officials harbored any serious animosity toward Smith, they would have taken no action. Rather, it seems that in spite of what may be viewed as Smith's idiosyncratic personality, his reputation, and what have you, the Respondent's officials took their duty to represent Smith seriously and, in my view, fairly. Any claim that the Respondent harbored any serious animus toward Smith is simply not evident on this record.

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.